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**Preliminary References to the Court of Justice of
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by

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Preliminary References to the Court of Justice of the EU and the Right to a Fair Trial under Article 6 ECHR

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☞ European Court of Human Rights; Reasons; References to European Court; Right to fair trial

Abstract

According to art.267 of the Treaty on the Functioning of the European Union (TFEU), the courts of the Member States may—and sometimes must—refer questions about the validity and interpretation of EU law to the Court of Justice of the EU so that it can make a binding ruling. This article reviews the practice of the European Court of Human Rights (ECtHR) on the demands that art.6 of the European Convention on Human Rights (ECHR), on the right to a fair trial, make on Member States' courts when considering making a reference to the Court of Justice for a preliminary ruling. Among other things, it is pointed out that the ECtHR practice on the requirement to give reasons for not making a reference appears to go further than several of the rulings given by Member States' courts.

Introduction

In recent years in several cases the European Court of Human Rights (ECtHR) has had the opportunity to determine what requirements art.6 of the European Convention on Human Rights (ECHR), on the right to a fair trial, makes on national courts that must decide whether or not to accept a request to make a reference to the Court of Justice of the European Union for a preliminary ruling. The question has been whether a national court may breach art.6 ECHR if it refuses to make a preliminary reference, and if so when such a breach materialises.

Article 6 ECHR only applies to criminal proceedings (in a broad sense) and cases concerning “civil rights and obligations”. This means that the provision does not apply to all aspects of EU law. However, art.47 of the Charter of Fundamental Rights of the European Union contains a provision on a right to a fair trial, which effectively reproduces art.6 ECHR but with effect for all EU law. Since art.47 of the Charter must be interpreted in accordance with art.6 ECHR, it must be assumed that if there is an obligation to give reasons under art.6 ECHR this obligation applies to all EU law.

In this article we give an account of ECtHR case law and assess the consequences of this case law for the national courts' handling of requests to make references to the Court of Justice for preliminary rulings.

An obligation to make a reference pursuant to Article 6 ECHR?

Whether a decision of a national court not to refer a question for a preliminary ruling can constitute a breach of art.6 ECHR has been raised in several cases. This applies to both references by national courts to the Court of Justice pursuant to art.267 TFEU and to the judicial systems in some Member States where

lower courts can (or shall) refer certain questions to another national court, for example where a lower court is not competent to decide a question of constitutional law and is required to refer such questions to a national constitutional court.

In the *Coëme* case the ECtHR decided whether the Belgian Cour de cassation had breached art.6 ECHR by rejecting a request to make a reference to the Belgian Cour d'arbitrage on certain matters that were relevant to the main case. The ECtHR stated that the ECHR did not “as such, guarantee any right to have a case referred by a domestic court to another national or international authority for a preliminary ruling”. This was so,

“even where a particular field of law may be interpreted only by a court designated by statute and where the legislation concerned requires other courts to refer to that court, without reservation, all questions relating to that field.”¹

The comments of the ECtHR in the *Coëme* case have subsequently been carried over to the question of a national court's refusal to make a reference to the Court of Justice for a preliminary ruling. On several occasions the ECtHR has stated that the ECHR does not guarantee a right to have a case referred to the Court of Justice to obtain a preliminary ruling pursuant to art.267 TFEU.² This seems to be in harmony with the statement of the Court of Justice that the preliminary ruling procedure,

“establishes direct cooperation between the Court and the courts and tribunals of the Member States by way of a non-contentious procedure excluding any initiative of the parties.”³

The Court of Justice has also stated,

“that Article 267 TFEU does not constitute a right of action available to the parties to a case pending before a national court; thus, the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of Union law does not compel the court concerned to consider that a question has been raised within the meaning of Article 267 TFEU. Accordingly, the fact that the interpretation of a Union act is contested before a national court is not in itself sufficient to warrant referral of a question to the Court for a preliminary ruling.”⁴

Obligation to give reasons pursuant to Article 6 ECHR

In the *Coëme* case the ECtHR added that,

“it is not completely impossible that, in certain circumstances, refusal [to make a preliminary reference] by a domestic court trying a case at final instance might infringe the principle of fair trial, as set forth in Article 6 § 1 of the Convention, in particular where such refusal appears arbitrary.”⁵

The ECtHR has considerably clarified this rather vague statement in subsequent cases. It is now clear that a decision not to refer a question for a preliminary ruling can constitute a breach of art.6 ECHR if the

¹ *Coëme v Belgium* ECHR 2000-VII at [114].

² See e.g. *John v Germany* (2007) 45 E.H.R.R. SE4.

³ *Slob v Productschap Zuivel* (C-496/04) [2006] E.C.R. I-8257 at [34].

⁴ *Talasca v Stadt Kevelaer* (C-19/14) EU:C:2014:2049, order at [22]. See also *Adiamix v Direction départementale des finances publiques de l'Orne* (C-368/12) EU:C:2013:257, order at [17]; *Mlamali v Caisse d'allocations familiales des Bouches-du-Rhône* (C-257/13) EU:C:2013:763, order at [23]; *R. (on the application of International Air Transport Association (IATA)) v Department of Transport* (C-344/04) [2006] E.C.R. I-403; [2006] 2 C.M.L.R. 20 at [28]; and *Diageo Brands BV v Simiramida-04 EOOD* (C-681/13) EU:C:2015:471; [2016] Ch. 147 at [59].

⁵ *Coëme* ECHR 2000-VII at [114]. See also the two unpublished decisions which the ECtHR refers to at [114] of its *Coëme* judgment: *Wynen and Centre Hospitalier Interrégional Edith-Cavell v Belgium* ECHR 2002-VIII at [41]–[43]; and *Ernst v Belgium* (2004) 39 E.H.R.R. [74]–[76].

national court does not explain why it declines to make a reference, so the decision may appear arbitrary. Thus, in the case of *Canela Santiago v Spain* in 2001, the ECtHR ruled that the decision of the Spanish Tribunal Supremos (Supreme Court) not to make a reference to the Court of Justice did not breach art.6 ECHR as the Tribunal Supremos had exhaustively reviewed the Court of Justice's case law on the obligation to make a reference and had found that it could make the decision itself without making a reference. The decision was thus not arbitrary.⁶

In the *Ullens de Schooten & Rezabek* ruling from 2011, the ECtHR held that where, exceptionally, a court decides not to make a reference for a preliminary ruling, there is an obligation to give reasons for such a decision:

"In the specific context of the third paragraph of Article 234 of the Treaty establishing the European Community (Article 267 of the Treaty on the Functioning of the European Union), this means that national courts against whose decisions there is no remedy under national law, which refuse to refer to the Court of Justice a preliminary question on the interpretation of Community law that has been raised before them, are obliged to give reasons for their refusal in the light of the exceptions provided for in the case-law of the Court of Justice. They will thus be required, in accordance with the above-mentioned *Cilfit* case-law, to indicate the reasons why they have found that the question is irrelevant, that the European Union law provision in question has already been interpreted by the Court of Justice, or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt."⁷

However, in the actual case the national court stated that the answer to the proposed question for reference had already been clarified by the Court of Justice; it set out the Court of Justice's case law and justified its view by reviewing the relevant judgments of the Court of Justice.⁸ On this basis the requirement to give reasons pursuant to art.6 ECHR had been complied with.

The ECtHR added that a corresponding obligation could also apply to courts that are not courts of last instance,

"the [European Court of Human Rights] does not rule out the possibility that, where a preliminary reference mechanism exists, refusal by a domestic court to grant a request for such a referral may, in certain circumstances, infringe the fairness of proceedings — even if that court is not ruling in the last instance ... The same is true where the refusal proves arbitrary ... that is to say where there has been a refusal even though the applicable rules allow no exception to the principle of preliminary reference or no alternative thereto, where the refusal is based on reasons other than those provided for by the rules, and where the refusal has not been duly reasoned in accordance with those rules."⁹

The requirement to give reasons expressed in the *Ullens de Schooten & Rezabek* case has since been repeated almost verbatim in a number of subsequent cases where, in several consecutive rulings, the

⁶ *Canela Santiago v Spain* (60350/00) 4 October 2001.

⁷ *Ullens de Schooten & Rezabek v Belgium* (3989/07 and 38353/07) 20 September 2011 at [62]. The obligation to give reasons is possibly made even clearer in the French language version of the judgment: "Il leur faut donc indiquer les raisons pour lesquelles elles considèrent que ...".

⁸ *Ullens de Schooten* (3989/07 and 38353/07) at [22] and [64].

⁹ *Ullens de Schooten* (3989/07 and 38353/07) at [59]. In *Irish Bank Resolution Corp* (E-18/11) [2012] EFTA Court Reports 592 at [64], the EFTA Court stated that the comments of the ECtHR "may also apply when a court or tribunal against whose decisions there is no judicial remedy under national law overrules a decision of a lower court to refer the case, whether in civil or criminal proceedings, to another court, or upholds the decision to refer, but nevertheless decides to amend the questions asked by the lower court". The EFTA Court did not refer to an authoritative source in support of this statement, which does appear obvious.

ECtHR has examined the national courts' reasoning for not making preliminary references, thereby throwing light on the more detailed extent of the obligation.

Thus, in the *Ferreira* case the Portuguese Supreme Court had rejected an application to refer a question to the Court of Justice for a preliminary ruling with a short comment to the effect that in the actual case it was not relevant to apply the EU provision in question directly, that this provision had never been intended to govern the situation, and that the question should thus be resolved on the basis of Portuguese law. The ECtHR found that this justification was sufficient under art.6 ECHR.¹⁰ Similarly, in the *Vergauwen* case, the ECtHR found that the obligation to give reasons had been satisfied. Here the Belgian Constitutional Court had declined to refer to the Court of Justice a question for a preliminary ruling, stating that some of the proposed questions were irrelevant to the case since they were based on a clearly incorrect interpretation of the EU directives invoked. As for some of the other proposed questions, the Constitutional Court observed that the Court of Justice had already stated that the issue in question was not governed by EU law.¹¹

In the *Stichting Mothers of Srebrenica* case,¹² the ECtHR, arguably, took a slightly different approach to the national court's reasoning for refusing to make a preliminary reference. Here the Netherlands Hoge Raad (Supreme Court) refused to refer a question to the Court of Justice on the relationship between the United Nations' immunity to criminal prosecution and the requirement under EU law for effective legal protection. Despite the Hoge Raad's very brief reasoning for not making a reference to the Court of Justice, the ECtHR found that there had not been a breach of art.6 ECHR. In this regard the ECtHR observed:

"The Court finds that in the instant case the summary reasoning used by the Supreme Court was sufficient. Having already found that the United Nations enjoyed immunity from domestic jurisdiction under international law, the Supreme Court was entitled to consider a request to the Court of Justice of the European Union for a preliminary ruling redundant.

More generally, although Article 6 requires judgments of tribunals adequately to state the reasons on which they are based, it does not go so far as to require a detailed answer to every submission put forward; nor is the Court called upon to examine whether an argument is adequately met, or the rejection of a request adequately reasoned."

As will be clear from the above quotation, the ECtHR has taken into account the fact that the national court's substantive decision made a reference redundant and, consequently, has "softened" the obligation to give reasons for not making a preliminary reference.

While, in all the above cases, the ECtHR found that there had been no breach of art.6 ECHR, in two recent rulings the Strasbourg Court has found that there was such breach. The first of these two rulings was given in the *Dhahbi* case¹³ and concerned a Tunisian citizen who had taken up residence in Italy and obtained a work permit. Among other things the case raised the question of whether Dhahbi was entitled to a family allowance pursuant to the Association Agreement between the EU and Tunisia. Dhahbi requested both the Italian Court of Appeal and the Italian Court of Cassation to make a reference to the Court of Justice for a ruling. However, both courts rejected Dhahbi's claim for a family allowance without making a preliminary reference to the Court of Justice regarding the correct interpretation of the Association Agreement.

Dhahbi thereafter brought proceedings against Italy to the ECtHR. In its ruling the Strasbourg Court started by confirming its previous practice, according to which it follows from art.6 ECHR that a national court of last instance that refuses to make a reference for a preliminary ruling must state the reasons why

¹⁰ *Ferreira v Portugal* (30123/10) 4 September 2012.

¹¹ *Vergauwen v Belgium* (4832/04) 10 April 2012.

¹² *Stichting Mothers of Srebrenica v Netherlands* (2013) 57 E.H.R.R. SE10.

¹³ *Dhahbi v Italy* (17120/09) 8 April 2014. The ruling in *Dhahbi* was unanimous.

it finds that the Court of Justice has already ruled on the question (*acte éclairé*), that the question is *acte clair*, or that the question is not relevant to the decision in the case.

The ECtHR then considered the judgment of the Italian Court of Cassation and found that it did not refer to Dhahbi's request for a reference to the Court of Justice for a preliminary ruling. Nor did the judgment give any reason why the question should not be referred. Thus it was not clear from the judgment whether the question was regarded as irrelevant, concerned a provision that was clear (*acte clair*), had already been interpreted by the Court of Justice (*acte éclairé*), or whether the Italian Court of Cassation had simply ignored Dhahbi's request for a reference for a preliminary ruling. The ECtHR added that the judgment of the Italian Supreme Court contained no reference to the Court of Justice's case law.¹⁴ These findings were sufficient to conclude that there had been a breach of art.6(1) ECHR.¹⁵

Similarly, the *Schipani* case concerned the Italian courts.¹⁶ In this case an otherwise detailed appeal ruling did not contain any explicit reference to the applicants' request for a preliminary ruling or any reason for refusing the request to make a reference. Unsurprisingly, the ECtHR considered that the Italian Court had not complied with the obligation to give adequate reasons. During the proceedings before the ECtHR, the Italian Government argued that the reasoning for not making a reference in accordance with art.267 TFEU had been indirectly apparent from the national court's ruling in the case. The ECtHR did not comment on whether, in principle, such indirect reasoning could fulfil the requirements of art.6 ECHR but merely stated that the Italian Court's ruling did not provide sufficient reasoning with regard to the two preliminary questions that the applicants had, in vain, asked the national court to refer.

When does the ECHR require a statement of reasons for not requesting a preliminary ruling?

In the *Dhahbi* and *Schipani* rulings the ECtHR expressly referred to the fact that the Italian Court of cassation ruled as a court of last instance. The obligation to give reasons was thus linked to the double circumstance that in the two cases there was no possibility for some other court to make a reference for a preliminary ruling and that, under EU law, courts or tribunals of last instance that decide cases in which EU law applies have an obligation to make references for preliminary rulings on the correct interpretation of the EU law unless there is no real doubt about the interpretation.

However, it is not necessarily only courts and tribunals of last instance that must take account of art.6 ECHR when deciding whether to make a reference for a preliminary ruling. As stated above, in connection with the *Ullens de Schooten* case the ECtHR has ruled that it is possible that courts that are not courts of last instance can infringe art.6(1) if they decline to make a reference to the Court of Justice.¹⁷ This is supported by the decision in the *Irish Bank Resolution Corp* case in which the EFTA Court referred to the ECtHR decision in the *Ullens de Schooten* case.¹⁸

It is far from clear when a court that is not a court of last instance will infringe art.6 ECHR by declining to make a reference for a preliminary ruling.¹⁹ Presumably this could at least be the case in the few situations

¹⁴ *Dhahbi* (17120/09) at [33].

¹⁵ *Dhahbi* (17120/09) at [34].

¹⁶ *Schipani v Italie* (38369/09) 21 July 2015. The ruling in *Schipani* was unanimous with regard to outcome, but one judge dissented with regard to the reasoning behind the ruling. The majority, however, followed the reasoning earlier established in *Dhahbi*.

¹⁷ See also *Herma v Germany* (54193/07) 8 December 2009. In this case the ECtHR referred to art.267 TFEU as a whole and not just to art.267(3), which is limited to courts and tribunals of last instance.

¹⁸ *Irish Bank Resolution Corp* (E-18/11) [2012] EFTA Court Reports 592 at [64].

¹⁹ In the *Ullens de Schooten* case the ECtHR gave some general indications of when a court that is not a court of last instance could be covered by art.6(1) ECHR in connection with a possible reference for a preliminary ruling. See our discussion of this judgment above.

where, under certain circumstance, courts that are not of last instance have an obligation to make references under EU law.²⁰

According to ECtHR case law, the obligation to state reasons is particularly relevant when a court of last instance declines to make a reference for a preliminary ruling at the request of one of the parties without adequately addressing the arguments which one or both of the parties may have made in support of such a reference. Presumably, a partial rejection/partial acceptance of a request to make a reference for a preliminary ruling is also covered by ECtHR case law. Thus, if a party asks for three questions to be referred and a national court only refers two of them, without giving reasons, it is natural to assume that the situation will be covered by the ECHR requirement to give reasons.

However, the case law of the ECtHR does not appear to provide a basis for assuming that a national court of last instance that does not give justification for refusing to make a reference to the Court of Justice will always be in breach of art.6(1) ECHR. On the contrary, the ECtHR has previously stated that a refusal to make a reference without giving reasons will not constitute a breach of art.6 ECHR where a party's request for a preliminary ruling is not sufficiently supported by argument and if the matter raises no fundamentally important issue.²¹

It is therefore natural to assume that the obligation to give reasons only arises where one party formally requests a reference to be made for a preliminary ruling, but not where a party merely refers to the possibility of a reference without formally asking the national court to make such a reference or where the question is merely considered by the court without it having been requested by the parties.

What are the requirements under Article 6 ECHR for the content of the reasons to be given?

Having found that where one party formally requests a reference to be made for a preliminary ruling the ECHR requires a national court to give a statement of reasons for not making a preliminary reference, the next question concerns the requirements for the content of the reasons to be given under art.6(1) ECHR when the national court refuses to make such reference.

The cases brought before the ECtHR hitherto seem relatively straightforward. In both the *Dhahbi* and *Scipani* cases the Italian Court of cassation entirely failed to give any reason why it did not accept the requests for references for a preliminary ruling. In these cases there could be little doubt that the obligation to give reasons had not been fulfilled. On the other hand, the reasons given for declining to make a reference in the *Ullens de Schooten* case were so detailed that it was obvious that the ECtHR should find that the obligation to give reasons had been fulfilled. The same applies to the other cases referred to above, where the national courts not only stated in abstract legal terms that there was no basis for making a reference, but also set out the Court of Justice's case law relevant to the case and thereby demonstrated why this was so.

It is therefore difficult, on the basis of the ECtHR existing case law, to determine more precisely the requirements as to the content, precision and level of detail of the reasons to be given, and to assess whether these requirements go further than the requirements that may apply under the Member States' various procedural laws. This is particularly the case since in other contexts the ECtHR has stated that the extent

²⁰ If a case before a national court gives rise to a question about the validity of an EU act, and if the court is inclined to disapply the EU act on the basis that it is invalid, the court will be obliged to make a reference for a preliminary ruling, regardless of whether it is a court of last instance; see *Firma Foto-Frost v Hauptzollamt Lubeck-Ost* (314/85) [1987] E.C.R. 4199; [1988] 3 C.M.L.R. 57.

²¹ *John v Germany* (15073/03) 13 February 2007.

of the requirement for justification pursuant to art.6 ECHR “may vary according to the nature of the decision and must be determined in the light of the circumstances of the case”.²²

According to the practice of the ECtHR, there will be no human rights problem if, in a ruling not to make a reference for a preliminary ruling, a national court gives an account of the circumstances of the case which, in its view, are reasons for not making a reference and makes a detailed review of the Court of Justice’s case law that is relevant to the case. An example of this is the Danish Supreme Court’s refusal to make a reference for a preliminary ruling in a case on parallel imports. In this regard the Supreme Court gave the following reasons:

“According to the case law of the Court of Justice of the European Union, the fact that a parallel-imported pharmaceutical product can be lawfully marketed in Denmark, without changing its name to that which the direct importer uses for the medicine in Denmark, is not sufficient for a finding that it is not objectively necessary to change the name in order to have effective access to the Danish market. According to the case law of the Court of Justice, a significant marketing investment for the parallel-imported product with a different name to that of the directly imported product is not a precondition whereby it can be objectively necessary to gain effective access to the Danish market.

The other questions which Orifarm has requested should be referred concern exclusion from a part of the market, consumer choice of a cheaper parallel-imported product and the burden of proof in this connection. Given the clarity created in this area by the Court of Justice’s case law, as reviewed above, in the view of the Supreme Court there is no doubt about the meaning of the EU law that necessitates a referral of a question to the Court of Justice for a preliminary ruling.”²³

This statement of reasons is at least as clear as the statements that the ECtHR found to comply with art.6 ECHR in the *Ferreira*, *Vergauwen* and *Stichting Mothers of Srebrenica* cases.

Thus, where a national court declines to make a preliminary reference in the actual case, stating that the proposed preliminary question has already been referred in another dispute and that it may be expected that the Court of Justice will rule on this other reference before the national court declining to make a preliminary reference must decide on the case before it, this will be fully sufficient to comply with art.6 ECHR.

Finally, there are unlikely to be problems where a national court declines to make a preliminary reference because the parties’ disagreement in reality concerns the application of provisions about whose abstract content there is no disagreement. The same applies in those cases where the court refuses to make a preliminary reference on the basis that, at the point in the proceedings where one (or both) parties has requested such reference, it is too early to determine whether a reference should be made; for example because the specific character of the EU issues to which the case may give rise depends on an interpretation of provisions of national law, and the national court thus holds open the possibility of deciding to refer at a later time.

However, far from all national courts approach such questions so specifically and in such detail. There have been several examples where rulings of national courts refusing to make a preliminary reference have been based on a model more or less corresponding to the following reasoning of the Supreme Administrative Court of Sweden:

²² *García Ruiz v Spain* (2001) 31 E.H.R.R. 22 at [26]. See likewise *Hansen v Norway* (15319/09) 39 B.H.R.C. 89; *Gorou v Greece* (12686/03) 20 March 2009; and *Buzecu v Romania* (61302/00) 24 May 2005. Among others, the requirements to give reasons expressed in the *Dhahbi* judgment have been discussed in the Netherlands Council of State (Raad van State) 5 March 2015 in Case 201500670/1/V2.

²³ *Ugeskrift for Retsvæsen* 2013, p.401 H (unofficial translation).

“The issues of EU law raised in the case can be decided using the guidance of the case law of the Court of Justice. Thus, there is no reason to refer the matter to the Court of Justice.”²⁴

Whereas such reasoning indicates whether the decision to refuse to make a reference is, for example, because EU law is not applicable or that the matter is one of *acte éclairé* or *acte clair*, it does not indicate why this is so and it does not give a more specific account of the basis for this view, for example by stating that the situation was an internal matter where the relevant EU rules do not apply, or that the Court of Justice has already ruled on the question that one of the parties wants referred for a preliminary ruling; it merely states that Court of Justice case law can be used as guidance. The abstract nature of the reasoning is underlined by the fact that by simply changing a few words about the nature of the dispute, the formula can be used in all kinds of cases, as it contains nothing about which Court of Justice judgments or sources of law justify the assessment that there is a case of *acte clair* (or *acte éclairé*—if that is what the statement of the Supreme Administrative Court must be understood to mean), nor does it state what interpretation of EU law is correct beyond question. As already stated, ECtHR case law does not enable it to be stated, with a reasonable degree of certainty, how thorough the reasoning must be for refusing to make a reference for a preliminary ruling. However, the wording of the ECtHR judgments, containing abstract statements about the extent of the requirement to give reasons, suggests that reasons along the lines of the Supreme Administrative Court of Sweden quoted above would not satisfy the requirement of art.6 ECHR. In six judgments the ECtHR has now stated that national courts not only have an obligation to say that one of the proper reasons for not making a reference exists in a case, but the courts must also,

“indicate the reasons *why* they have found that the question is irrelevant, that the European Union law provision in question has already been interpreted by the [Court of Justice of the European Union], or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt.”²⁵

It therefore does not seem obvious that it will be sufficient merely to state, for example, that there is a situation of *acte clair* without it being clear to the parties *why* the national court finds this to be so.²⁶

Does this mean that a number of the rulings of national courts rejecting applications to refer questions for preliminary rulings do not live up to the ECtHR requirements? Not necessarily. In our view it is also necessary to assess two further factors.

First, it will presumably be relevant whether a request for a reference is supported by good reasons. Thus, the fact that a party generally and imprecisely asks for the relevant provisions of EU law to be put before the Court of Justice can hardly mean that the national court must give an extensive statement of reasons for refusing to make a reference. On the other hand, if a party has carefully and persuasively argued that a reference for a preliminary ruling is necessary, it seems obvious that this will make a higher demand on the court’s reasoning for refusing to make a reference.

Secondly, and in practice equally importantly, it can hardly be required that the reasons for refusing to make a reference for a preliminary ruling should be entirely and solely derivable from the ruling whereby the request is refused. In our view it must be sufficient that the reasoning is given fully when read in the

²⁴ *Regeringsrättens Årsbok* (Yearbook of the Supreme Administrative Court) 2009 No.72, quoted in U. Bernitz, “Preliminary References and Swedish Courts: What Explains the Continuing Restrictive Attitude?” in P. Cardonnel, A. Rosas and N. Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Oxford: Hart Publishing, 2012), pp.177–187 at p.181. Other examples from Sweden have been provided by M. Johansson and S. Ahmed, “De högsta domstolsinstansernas motiveringsskyldighet vid beslut att inte inhämta förhandsavgörande från EG-domstolen—en papperstiger?” (2009) 4 *Europarättslig Tidskrift* 783, 786.

²⁵ *Dhahbi* (17120/09) at [31] (emphasis added). See likewise *Schipani* (38369/09) at [69]; *Ullens de Schooten* (3989/07 and 38353/07) at [62]; *Ferreira* (30123/10), point A; *Vergauwen* (4832/04) at [90]; and *Stichting Mothers of Srebrenica* (2013) 57 E.H.R.R. SE10 at [172].

²⁶ Depending on the circumstances, the obligation to give reasons could be fulfilled by the court referring to the arguments (or part thereof) presented by one of the parties.

context of the final judgment in the case. What is decisive must be whether the national court's decision on the reference for a preliminary ruling and the national court's final judgment together are clear about the circumstances to which the court has given weight for refusing to make a reference, for example by giving a review of the Court of Justice's case law or by showing that the question is in reality subsumed under legal provisions whose content do not in themselves raise such doubts as to require a reference.²⁷ This understanding also finds support in the fact that, depending on the circumstances, exhaustive justification for not making a reference can cause problems in relation to another aspect of art.6 of the ECHR, as this could mean that a national court would in reality be forced to decide on the EU law elements of a case before the parties have exchanged all views and arguments with regards to the main action.

Conclusion

The fact that the interpretation of a Union act is contested before a national court does not in itself entail that this national court is under an obligation to make a preliminary reference to the Court of Justice. However, if one (or both) parties to a case requests that the national court makes a preliminary reference, it follows from ECtHR case law that—at least where the national court is deciding in the last instance—it must be clear from the national court's ruling why the question should not be referred. Thus, the national court must state whether the question was irrelevant, whether it concerned a provision that was clear (*acte clair*), or whether it had already been interpreted by the Court of Justice (*acte éclairé*). If the national court does not provide reasons but instead merely ignores the request for a preliminary reference, this refusal may prove arbitrary and thereby constitute an infringement of art.6 ECHR.

While the existing case law of the ECtHR does not allow us to determine more precisely the requirements as to the content, precision and level of detail of the reasons that a national court must give when refusing to make a preliminary reference, it still appears safe to conclude that if, in a decision not to make such reference, a national court gives an account of the circumstances of the case which, in its view, are reasons for not making the reference and makes a detailed review of the Court of Justice's case law that is relevant to the case there will be no human rights problems.

We also find that there are unlikely to be problems where a national court declines to make a preliminary reference on the basis that the parties' disagreement in reality concerns the *application* of provisions about whose *abstract content* there is no disagreement. The same applies in those cases where the court refuses to make a preliminary reference on the basis that, at the point in the proceedings where one (or both) parties has requested such reference, it is too early to determine whether a reference should be made.

If our construction of ECtHR practice is correct, it should not cause insurmountable problems for the Member States' courts. However, in order to be on the safe side, it is recommended that national courts should generally take care to state their reasons for refusing references in situations where the issue arises.

²⁷ See in support of this *Stichting Mothers of Srebrenica* (2013) 57 E.H.R.R. SE10, discussed above.